COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2015-SC-000094-D
(2013-CA-000309)

KENTUCKY RETIREMENT SYSTEMS — APPELLANT

V.

DIANNE CARSON — APPELLEE

BRIEF FOR APPELLANT

Respectfully submitted,

KENTUCKY RETIREMENT SYSTEMS

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief for Appellant has been mailed, postage prepaid, on this the 16th day of November, 2015 to: Hon. Nathan Haney & Hon. Lisa Belew, Sullivan Law Office, 1500 Story Avenue, Louisville, Kentucky 40206; Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court, 222 St. Clair Street, Frankfort, Kentucky 40601; and Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.

I further certify that the Record on Appeal, from the Clerk of the Court of Appeals, was not withdrawn by counsel for Appellant.

COUNSEL FOR APPELLANT

INTRODUCTION

This appeal is taken from the Kentucky Court of Appeals' January 23, 2015 Published Opinion, holding that the Franklin Circuit Court did not err in its KRS Chapter 13B judicial review of an agency decision. In so doing, the lower courts refused to resolve preservation concerns fatal to Appellee's appeal and wrongly declined to apply the doctrine of *res judicata* to Appellee's successive attempts to gain disability benefits. This Court should reverse.

STATEMENT CONCERNING ORAL ARGUMENTS

Kentucky Retirement Systems requests an opportunity to be heard. This case involves complex legal issues regarding issue preservation and *res judicata*. Oral argument will assist this Court in defining the issue(s) preserved for appellate review and determining whether recent appellate decisions approving application of *res judicata* to repetitive disability claims remains good law.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

I. Introduction.

Dianne Carson (hereafter "Appellee") is a member of the Kentucky Employees Retirement System (KERS) formerly employed as a Disability Adjudicator for the Cabinet for Health and Family Services. The essential duties of her job were described as "determines eligibility for social security disability benefits."[1] She has 10.5 years of service credit (less than the requisite 27 years for full retirement benefits). Appellee worked seated 7 of 8 hours daily. The heaviest items Appellee lifted on a frequent basis were case files weighing 5 to 10 pounds. Physical exertion requirements were determined to be that of "sedentary work." *See* KRS 61.600(5)(c). Appellee was accommodated by her employer with a reduced work schedule to 4 hours daily (half-day shifts).

Appellee filed multiple applications for disability benefits at Kentucky Retirement Systems. Appellee's first application was submitted in November of 2007 alleging a disability from "congestive heart failure."[2] Appellee stated she could no longer work because of muscle pain and fatigue. Appellee's first application was evaluated twice by the medical examiners and denied.[3] Appellee appealed the determination and was provided a full evidentiary hearing on December 19, 2008. Appellee testified on her own behalf. No other witnesses testified.[4] Appellee testified that she did not believe she could return to work due to fatigue and fear that her defibrillator would "go off."[5] On May 29, 2009, the

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[1] (A.R., p. 15).
[2] (A.R., p. 4).
[3] (A.R., pp. 70-77, 105-111).
[4] (A.R., pp. 187-189).
[5] (Tape, 12/19/2008, 00:25:23 - 00:28:12, 00:35:09 – 00:38:49).

hearing officer issued a detailed recommended order that Appellee's application for disability be denied.[6] The hearing officer found that the objective medical evidence did not prove a permanent incapacity from sedentary work, stating in relevant part:

> Claimant was employed as a Disability Adjudicator I for the Department of Disability Determinations. Claimant's job duties were to determine claimant's eligibility for Social Security Benefits.
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> Claimant's position is properly classified as sedentary in nature. Claimant's duties involved sitting seven hours during an eight hour work day and she seldom/rare had to lift/carry up to ten pounds. She had assistance from co-workers and had the ability to alternate between sitting and standing/walking.
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> Reasonable accommodations were provided by the employer in the form of half day shifts.
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> The objective medical evidence does not show by a preponderance of the evidence that Claimant is permanently mentally or physically incapacitated from her former job duties or jobs of like duties, as a result of her cardiac impairments or the cumulative effects of these conditions and is likely to remain so for a period of not less than 12 months from the date of her last paid employment. The finding is made with consideration of evidence of the Claimant's residual functional capacity and the physical exertion requirements of her last job, as accommodated, or a job of like duties. The Claimant alleged disability due to congestive heart failure. She alleged a heart attack in April 2007 left her weak and she continues to have overall muscle pain and fatigue. The claimant was diagnosed with nonischemic cardiomyopathy in April 2007. A catheterization was performed that showed nonobstructive coronary disease and an ejection fraction of 20%. The Claimant was also diagnosed with left bundle branch block and a polymorphic tachycardia. She was treated with medications and showed an improvement in her ejection fraction of 30% to 35% by July 2007. The Claimant continued to complain of shortness of breath and a 24 hour Holter monitor test was performed in September 2007. This was followed by a biventricular defibrillator (ICD-implantable cardioverter-defibrillator). Claimant's treating physician released her for work in September 2007. The Claimant was limited to working four hours per day and had lifting, standing, walking and sitting limitations. The Claimant's employer accommodated the limitations of half day shifts and reduced her case load

[6] (A.R., pp. 220 – 236).

and duties. The rest of the limitations were within the physical exertions required of the sedentary job. The position involved sitting for seven hours of an eight hour shift with assistance from co-workers being available and the ability to alternate between sitting and standing/walking. She did not have to lift over ten pounds and the work did not require physical exertion. The Claimant testified that the position was stressful due to the volume of cases and the time restrictions. The Claimant also testified that she was always able to complete her job duties without the need for overtime. The Claimant was to be increased to a normal work week if she was able to tolerate the part time status. The Claimant returned to work for two days in the part time status. After the two days of part time work, she had to have the ICD optimized. The Claimant completed both shifts with the only problem being that she became lightheaded and had to briefly rest about half way through the shift. After the ICD was optimized the Claimant again showed improvement and felt better. The Claimant did not attempt to return to work after the optimization in October 2007. The Claimant has continued to have the ICD optimized about every three months and feels better after each procedure. A CT scan in October 2007 was normal and the examination that same month by Dr. Angelis did not show any new symptoms. The Claimant was examined by Dr. Trimbur, Louisville Heart Specialist in January 2008. Dr. Trimbur opined that there was no suggestion of congestive heart failure. An x-ray that same month did not demonstrate any active disease. The Medical Review Board recommended denial of the claim on two occasions. The initial review was a unanimous decision with the finding that the Claimant was authorized to return to work by her treating physician, the limitations were either accommodated or within the physical exertions of the position, the treatment had been for a short period of time with improvement and there was a lack of objective medical evidence to support the subjective complaints. Dr. Growse raised the issue of a preexisting condition. Upon the second review in April 2008, Dr. Growse again raised the issue of preexisting condition concerning the underlying atherosclerotic process. Dr. McElwain recommended denial based upon a normal physical examination, a cardiac examination that did not show congestive heart failure and the absence of any documentation that would prevent Claimant from performing her sedentary job duties. The Claimant showed a normal heart rate and rhythm in July 2008. The ICD showed normal function with no arrhythmia. The Claimant's subjective complaints of fatigue continued and Dr. Mann recommended an optimization of the ICD. A 2-D echocardiogram that month showed an ejection fraction of 23%. The mitral valve, tricuspid valve, pulmonic valve and aortic valve were all normal in structure, motion and function. There was moderate regurgitation in the mitral and tricuspid valves. In November 2008, a physical examination showed no acute distress, normal heart rate and rhythm with arterial and cordial pulses normal. Claimant complained of chest discomfort, shortness of breath and fatigue. An optimization was recommended. In January 2009, Claimant was approved for a laparoscopic

> cholecystectomy. Examination showed regular heart rate and rhythm, no documented arrhythmia in recent past, no acute/active cardiopulmonary process. The Claimant testified that the reason she did not return to work was fatigue and the fear that her defibrillator would go off. The heart defibrillator has only gone off once and that was at home. The heart medications would not prevent the Claimant from performing sedentary work. The Claimant's subjective complaints of fatigue are resolved by optimizations of the ICD. The objective medical evidence showed a normal heart rate and rhythm four months and again at ten months after her last date of paid employment, the ICD was functioning normal and she had a normal physical exam eight months after her last date of paid employment. The Claimant may have an impairment that would prevent her from doing strenuous activity, however, her position is of sedentary classification and her prior work experience is of the same nature. Claimant's employer accommodated her for half-day shifts and a reduced caseload. The Claimant has not produced objective medical evidence to show she was unable to perform her previous job duties, or jobs of like duties. [7]

On August 24, 2009, the Board of Trustees of Kentucky Retirement Systems issued a final order adopting the findings, conclusions and recommendation of the hearing officer.[8] Appellee did not challenge the agency final order and did not seek judicial review (appeal) of the above decision to the Franklin Circuit Court.

Two months later, on October, 21, 2009, Appellee filed another application for disability retirement benefits again alleging that she was unable to perform the sedentary work of a Disability Adjudicator.[9] Alongside her previously identified heart condition and associated fatigue, Appellee also now alleged Fibromyalgia as disabling.[10] Appellee's second application was also evaluated by Kentucky Retirement Systems' medical examiners.[11] Of interest, one physician noted that Appellee's cardiac condition had actually "improved from what it was before" and "because of improvement in her cardiomyopathy

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[7] (A.R., pp. 219 – 236)(Emphasis added).
[8] (A.R., pp. 245-246).
[9] (A.R., p. 249).
[10] (A.R., p. 249).
[11] (A.R., pp. 439-446).

as well as fibromyalgia, the applicant was denied disability."[12] Another physician found relevant that Appellee's ejection fraction had actually "improved from an earlier study."[13] Appellee's application was again denied and she again requested an evidentiary hearing.

Prior to the hearing, Kentucky Retirement Systems specifically raised that the previous agency final order (adopting the hearing officer's findings, conclusions and recommendation), was not challenged nor appealed and *res judicata* applied to evidence and claims previously litigated. Retirement Systems again raised the issue of *res judicata* at the onset of the second evidentiary hearing.[14] The hearing officer recognized the same and responded that "Mr. Bowman is correct at least as to matters in evidence previously considered; I am bound by the previous decision of the Board of Trustees."[15]

Kentucky Retirement Systems asserted that the new objective medical evidence submitted with the second application actually further supported that Appellee was not permanently incapacitated. The new evidence submitted included a November 2009 statement from her cardiologist that "I feel that Ms. Carson is actually doing very well." [16] An office visit note from Dr. Dunbar dated July 1, 2009, charts in relevant part: "doing exceptionally well;" "pain scores have decreased significantly;" "The Patient states that for the first time in years, she was able to exercise this morning;" "PAIN INTENSITY SCALE: Today: 0/10, Worst: 2/10, best: 0/10."[17] An office visit note from Dr. Dunbar dated August 12, 2009 states that "The patient is very stable;" "the patient enjoys a stable pain pattern;" and "She has been followed by Dr. James Thompson, our clinical psychologist. He feels

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[12] (A.R., pp. 440,441).
[13] (A.R., p. 443, 444).
[14] (Tape, 10/19/10, 9:44:00 – 9:44:55).
[15] (Tape, 10/19/2010, 9:43:55 - 9:46:15).
[16] (A.R., p. 281).
[17] (A.R., p. 263).

that she is doing extremely well." [18] On September 19, 2009, Dr. James Thompson's progress note charts in relevant part:

> She was in good spirits, was delighted with her much improved pain relief. Additionally, the patient reported that she is more physically and socially active than in the past, and is now exercising two or three times per week. She is also planning social events in the future, such as a high school class reunion.[19]

Accordingly, Kentucky Retirement Systems took the position that the new objective medical evidence submitted with the second application only further proved that Appellee was not permanently incapacitated from sedentary work.

Upon conclusion of the evidentiary hearing and briefing by the parties, the hearing officer issued findings, conclusions and a recommended order denying the request for disability retirement benefits. The recommended order recognized the previous findings from the first application and Appellee's decision not to challenge those findings stating: "This Hearing Officer is bound by the findings of the Board of Trustees' Report and Order as to all evidence considered in the course of the first application concerning Claimant's job and condition(s)."[20] The hearing officer then issued the following findings in relevant part:

> 3. Claimant was employed by the Department of Disability Determination Services as a Disability Adjudicator I. Claimant's job duties were previously determined by the Board of Trustees to be sedentary duty.
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> 4. Claimant filed her second application for disability benefits pursuant to KRS 61.600 based on Severe Left Ventricular Dysfunction secondary to Myocarditis, Fibromyalgia and Chronic Fatigue Syndrome.
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> 5. The Board of Trustees previously determined that reasonable job duty accommodations were provided by Claimant's employer in the form of half day shift and a reduction in caseload and duties.

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[18] (A.R., p. 261)(Emphasis added).
[19] (A.R., p. 495).
[20] (A.R., p. 662)(Emphasis added).

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9. Claimant has filed for disability retirement for the condition of Severe Left Ventricular Dysfunction Secondary to Myocarditis. This condition was also raised and considered in her first application for disability retirement benefits, and the condition was not found to be disabling by the Hearing Officer or the Board of Trustees at that time. It is clear from the administrative record that Claimant suffers from various subjective limitations from this alleged condition and her treating physicians have given her recommended limitations in her physical abilities to perform job duties. The additional evidence submitted in this second application show that Claimant continues to suffer limitations from her heart condition, but the objective medical evidence does not indicate that Claimant's heart condition has deteriorated. In fact, it appears that Claimant's ejection fraction has improved since her first application was reviewed. The work limitations outlined by Dr. David Mann on April 21, 2009 were still within the limitations the Board of Trustees considered when denying Claimant's first application, and are compatible with the accommodations Claimant's employer had previously put in place for her. Therefore, based on the previous decision of the Board of Trustees and a review of the medical evidence submitted with the current application, it is the finding of this Hearing Officer that Claimant failed to meet her burden of proof by a preponderance of the evidence that she is permanently disabled due to Severe Left Ventricular Dysfunction secondary to Myocarditis and the subjective symptoms arising therefrom that is expected to last for a continuous period of not less than twelve months from Claimant's last day of a paid employment.

10. Claimant has raised the condition of Fibromyalgia / Chronic Pain Syndrome as disabling. What little objective medical testing exists in the administrative record concerning this condition is contradictory. Dr. Dunbar originally found Claimant's pain presentation inconsistent with Fibromyalgia, and could find no specific reason to explain Claimant's subjective complaints of pain. Dr. Dunbar later listed Fibromyalgia and/or Chronic Pain Syndrome as a diagnosis. Claimant's pain management provider listed her diagnosis as Chronic Pain Syndrome. Regardless, the medical records indicate that Claimant's chronic pain is well controlled. Claimant reported she feels much better with treatment and is now more physically active and able to exercise. None of the doctors of the Medical Review Board found that Claimant's Fibromyalgia / Chronic Pain Syndrome would disable her from her previous job. Therefore, based on a review of the medical evidence submitted, it is the finding of this hearing officer that Claimant has failed to meet her burden of proof by a preponderance of the evidence that she is permanently disabled due to Fibromyalgia / Chronic Pain Syndrome that is expected to last for a

continuous period of not less than twelve months from Claimant's last day of paid employment.

11. Claimant also raised the condition of Chronic Fatigue Syndrome as permanently disabling. While there is reference to the diagnosis of Chronic Fatigue Syndrome in the records submitted, there is no indication of any testing having been performed to reach this diagnosis. There is no medical evidence in the record that Chronic Fatigue Syndrome, in and of itself, is disabling. The fatigue that Claimant suffers as a result of her heart condition was considered by the Board of Trustees in their denial of Claimant's first application. There is no new evidence submitted with Claimant's second application that would indicate her fatigue condition is any more disabling than when previously determined in her first application. Therefore, based on the previous findings of the Board of Trustees and a review of the medical evidence submitted, it is the finding of this hearing officer that Claimant has failed to meet her burden of proof by a preponderance of the evidence that she is permanently disabled due to Chronic Fatigue Syndrome that is expected to last for a continuous period of not less than twelve months from Claimant's last day of paid employment.

12. The objective medical evidence does not support a finding that Claimant is permanently disabled from the cumulative effects of her conditions. Claimant has failed to presented [sic] objective medical supporting the contention that the conditions of Severe Left Ventricular Dysfunction Secondary to Myocarditis, Fibromyalgia, or Chronic Fatigue Syndrome are disabling individually; and these conditions taken together do not demonstrate total and permanent disability, given the objective medical evidence presented for consideration. Claimant's heart condition and subsequent fatigue issues were previously considered in Claimant's first application for disability retirement benefits and were not found to be disabling. While subjectively Claimant suffers from pain and limitations based [on] her physical and mental status, there is no objective medical evidence to support a finding of disability for Claimant's alleged conditions. Therefore, it is the finding of this hearing officer that Claimant has failed to meet her burden of proof by a preponderance of the evidence that she suffers a permanent disability from the cumulative effects of her medical conditions that is expected to last for a continuous period of not less than twelve months from Claimant's last day of paid employment. [21]

Very limited exceptions were filed and Appellee did not take specific exception to the hearing officer's application of res *judicata* or the determination that the agency's findings and conclusion as to the objective medical evidence from the first application was

[21] (A.R., pp. 675-681)(Emphasis added).

binding.[22] In a final agency order dated May 13, 2011, the Board of Trustees adopted the hearing officer's findings, conclusion and recommendation that disability benefits be denied.

II. Appeal to the Franklin Circuit Court.

Despite failing to raise, object or properly preserve in exceptions to the hearing officer's recommended order the application of *res judicata* to her second claim for disability benefits, Appellee filed an appeal with the Franklin Circuit Court arguing that *res judicata* should not have been applied. Appellee argued to the Franklin Circuit Court that she was saved from the preservation requirement because she included the boilerplate language in her exceptions "incorporating by reference" her previously filed position statement and reply brief. Appellee alleges that because she argued against the *res judicata* effect generally in her previous briefs, it was preserved. Appellee then alleged that KRS 61.600(2) statutorily prohibited application of *res judicata*.[23]

In response, Kentucky Retirement Systems asserted:

> As an initial matter, Petitioner's argument that *res judicata* is inapplicable was not raised in the exceptions to the hearing officer's recommended order. The failure to except to specific findings that are adopted in the agency final order bars further judicial review. *See Rapier v. Philpot,* 130 S.W.3d 560 (Ky. 2004). Accordingly, this argument was not properly preserved and should be summarily dismissed.[24]

Kentucky Retirement Systems reminded the Franklin Circuit Court that the Court of Appeals recently reaffirmed application of *res judicata* to disability determinations in *Hoskins v. Kentucky Retirement Systems, et al.,* 2011 WL 112147 (Ky. App.). [25] Without

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[22] (A.R., pp. 683-684).

[23] As a collateral matter, Appellee also asserted that Kentucky Retirement Systems failed to determine her residual functional capacity (RFC) under KRS 61.600(5)(b).

[24] *See* Franklin Circuit Court Brief for Kentucky Retirement Systems, pp. 10-11.

[25] Cited pursuant to CR 76.28(4)(c) – "opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky Appellate

acknowledging the Court of Appeals' opinion, the Franklin Circuit Court ruled that *res judicata* was contrary to the statutory scheme in KRS 61.600(2). The lower court justified its decision on the basis that "a person's medical condition, however, can and often does change and worsen over time. Further, medical evidence may not be initially available but often becomes available over time."[26] The Franklin Circuit Court did not rule on disability but rather reversed and remanded the matter to Kentucky Retirement Systems for further proceedings to reconsider and re-weigh claims and evidence submitted with the first application as well as the second application.

III. Appeal to the Kentucky Court of Appeals.

Kentucky Retirement Systems immediately appealed the incongruous result alerting the Court of Appeals to the unpreserved claim and deficient exceptions filed by Appellee. Kentucky Retirement Systems articulated that the law is clear that judicial review is limited to only those factual and legal conclusions to which explicit exception is taken. "Under Kentucky law, this rule of preservation precludes judicial review of <u>any part</u> of the recommended order not excepted to and adopted in the final order." *Givens v. Com.*, 359 S.W.3d 454, 461 (Ky. App. 2011)(Emphasis added). Kentucky Retirement Systems emphasized that it was error for the Franklin Circuit Court, in its role under the KRS Chapter 13B judicial review standard, to consider claims of *res judicata* error not properly preserved during the administrative process.

Kentucky Retirement Systems also underscored that the Franklin Circuit Court opinion was in direct derogation to a body of case law spanning a decade specifically

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decisions, rendered after January 1, 2003 may be cited for consideration by a court if there is no published opinion that would adequately address the issue before the court."

[26] *Id.* at p. 7.

applying *res judicata* to successive disability claims under KRS 61.600. In support, Kentucky Retirement Systems cited a spectrum of cases, including a recent Court of Appeals' decision approving the application of *res judicata* to disability retirement claims: *Holland v. Kentucky Retirement Systems*, 2003 WL 1256710 (Ky. App.); *Hoskins v. Kentucky Retirement Systems,* 2011 WL 112147 (Ky. App.); *Howard v. Kentucky Retirement Systems*, 2013 WL 5603579 (Ky. App.)[27] The most recent of these decisions, *Howard*, was actually issued during the pendency of the instant appeal and left no room to debate whether *res judicata* applied to successive disability claims. Leave was granted to cite this additional authority post-briefing.

Notwithstanding the body of law in unanimous support of the agency's position, by Opinion Affirming issued January 23, 2015, To Be Published, the Court of Appeals entertained Appellee's unpreserved claim and held for the first time, overturning years of precedent, that *res judicata* did not apply to multiple disability appeals under KRS 61.600. In so ruling, the Court of Appeals did not acknowledge nor weigh upon the undisputed fact that Appellee failed to claim erroneous application of *res judicata* in her exceptions to the hearing officer's recommended order and the standing body of law firmly establishing that failure to timely except with specificity bars further review under KRS Chapter 13B. The Court of Appeals provided only a skeletal analysis of its prior body of case law applying *res judicata*, and did not distinguish those cases from the present. The following month, the Court of Appeals issued a similar opinion to be published, *Kentucky Retirement Systems*

[27] Cited pursuant to CR 76.28(4)(c) and attached to the Appendix of this Motion for Discretionary Review.

v. Charles Wimberly, 2015 WL 832272 (Ky. App.) [28] again rejecting application of *res judicata* to successive disability claims under KRS 61.600.

This Honorable Court has now granted discretionary review of the lower court(s) outcomes. For the reasons herein, Kentucky Retirement Systems respectfully requests that the Court REVERSE the order(s) of the Franklin Circuit Court and Kentucky Court of Appeals and REINSTATE the agency final order as supported by the arguments below.

ARGUMENT

I. Standard of Review.

An appellate court's role in a KRS Chapter 13B appeal is to review the administrative decision, not to reinterpret or reconsider the merits of the claim, nor to substitute its judgment for that of the agency as to the weight of the evidence. *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006). The reviewing court may only overturn the decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence on the record. *Kentucky State Racing Comm. v. Fuller*, 481 S.W.2d 298 (Ky. 1972). As long as there is substantial evidence in the record supporting the agency's finding, the reviewing court must defer to that finding, even if there is evidence to the contrary. *Kentucky Comm. on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Fuller*, 481 S.W.2d at 298.

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[28] By order entered September 16, 2015, the Supreme Court of Kentucky granted discretionary review in *Wimberly* as well.

Likewise, the reviewing court may not substitute its own judgment as to the inferences to be drawn from the evidence of record for that of the administrative agency. *Railroad Comm. v. Chesapeake & Ohio*, 490 S.W.2d 763 (Ky. 1973). The trier of facts in an administrative agency "is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it." *Bowling v. Natural Resources and Envtl. Protection Cabinet*, 891 S.W.2d 406, 409-410 (Ky. App. 1994). "To put it simply the trier of facts in an administrative agency may consider all the evidence and choose the evidence that he believes." *Id.*, at 410. As long as there is substantial evidence in the record supporting the agency's finding, the Court must defer to that finding, even if there is evidence to the contrary. *Kentucky Comm. on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981).

II. The Franklin Circuit Court and Court of Appeals Erred When Considering Appellee's Unpreserved Argument Objecting to *Res Judicata.*[29]

The Franklin Circuit Court erred in considering Appellee's argument on the application of *res judicata*. The Court of Appeals' Published Opinion Affirming compounded the issue in patently failing to even acknowledge much less rule upon this primary substantive legal argument advanced by Kentucky Retirement Systems. Illustrative, the Court of Appeals' opinion plainly misstates the arguments presented upon judicial review when stating "KERS first argues that the trial court erred by rejecting the

[29] Pursuant to CR 76.12(4)(v) this issue was properly raised and preserved for judicial review. *See* Franklin Circuit Court Brief for Kentucky Retirement Systems, pp. 10-11, "Petitioner's argument that *res judicata* is inapplicable was not raised in the exceptions to the hearing officer's recommended order. The failure to except to specific findings that are adopted in the agency final order bars further judicial review. *See Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004). Accordingly this argument was not properly preserved and should be summarily dismissed." *See also* Court of Appeals Brief for Appellant, Kentucky Retirement Systems, argument "The Franklin Circuit Court Erred When Considering Appellee's Argument Objecting to Application of *Re Judicata.*" Pp. 9-12.

doctrine of administrative *res judicata* as it applies to determinations by KERS."[30] This is not accurate.

A cursory review of Kentucky Retirement Systems' brief before the Court of Appeals demonstrates that the first substantive argument advanced by the agency with supporting law was a lengthy preservation argument under the heading styled "The Franklin Circuit Court Erred When Considering Appellee's Argument Objecting to the Application of *Res Judicata.*"[31] Even assuming, *arguendo*, this argument had initially gone undetected by the Court of Appeals, it was again raised in Kentucky Retirement Systems' reply brief under the heading styled "Appellee Failed to Preserve *Res Judicata* for Judicial Review."[32]

Yet, the Court of Appeals' published opinion fails to acknowledge, offer a ruling or explanation for its decision not to apply firmly established rules of preservation, having the resulting effect of opening the door to future litigation of unpreserved claims in the context of administrative agency decisions. This Honorable Court must curb the lower court(s)' practice of unfettered judicial review of agency decisions by mandating compliance with the longstanding rule of law on issue preservation through appropriate exceptions.

Specifically, the recommended order cautioned Appellee that "Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to."[33] Yet, nowhere in Appellee's exceptions does she take issue with the portion

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[30] *See* Court of Appeals Opinion, p. 12.
[31] *See* Court of Appeals Brief for Appellant, Board of Trustees of Kentucky Retirement Systems, pp. 9-12.
[32] *See* Court of Appeals Reply Brief for Appellant, Board of Trustees of Kentucky Retirement Systems, pp. 1-3
[33] (A.R., p. 681).

of the hearing officer's recommended order (adopted as the agency final order) applying *res judicata* to claims and evidence submitted with the first application for disability. This Court recently reaffirmed that the party must raise specific arguments in exceptions to preserve those issues for further judicial review. *West v. Kentucky Retirement Systems,* 413 S.W.3d 578, 583 (Ky. 2013) ("We agree with the Systems that this issue was not properly preserved for judicial review. West did not raise the cumulative effect argument in his exceptions, which preserves administrative decisions for judicial review. *See Rapier v. Philpot*, 130 S.W.3d 560, 563 (Ky. 2004)."). Here, however, the Court of Appeals' published opinion operates to dilute this Court's clear directive in *West* regarding issue preservation. It cannot stand.

Though on notice from the onset of the administrative appeal process that Kentucky Retirement Systems would assert *res judicata* as pertaining to findings from the first application, Appellee never alleged in her exceptions to the recommended order that the hearing officer was wrong to apply this doctrine. Appellee brought only two succinct points of contention in her exceptions to the recommended order: (i) that the hearing officer did not make a finding regarding residual functional capacity (RFC), and (ii) the hearing officer made no finding regarding Appellee's credibility.[34]

"[U]nder Kentucky law, this rule of preservation precludes judicial review of <u>any part</u> of the recommended order not excepted to *and* adopted in the final order." *Givens v. Com.*, 359 S.W.3d 454, 461 (Ky. App. 2011)(Emphasis added). Givens, a *pro se* litigant, brought only generalized exceptions but failed to except with specificity to those portions of the hearing officer's recommended order which she disagreed and the Court of Appeals

[34] (A.R., pp. 682-684).

affirmed that further judicial review was barred as a result thereof. Citing *Collins v. Conley*, 288 S.W. 316 (Ky. 1926), *Givens* stressed that:

> *Collins* also underscores that exceptions must be specific. A clear, concise statement of a party's objection or objections obviates the need for the agency head or the Court, on subsequent judicial review, to guess at, or decipher, the party's intended argument regarding error. For this reason, even properly filed exceptions, containing objections 'couched in general terms with no specification of any concrete or particular error...are insufficient to authorize us or the court below to consider or to disturb the verdict for any alleged error, though valid, that may be argued as embraced in such general language.' *Challinor v. Axton*, 54 S.W.2d 600, 601 (Ky. 1932). *Givens* at 462. (Emphasis added).

Here, Appellee's exceptions are found in the administrative record on appeal, pages 682 through 685. Nowhere in these exceptions does Appellee take issue with, claim error upon, or otherwise disagree with the hearing officer's application of *res judicata*. A review of Appellee's exceptions provide no clear indication that she specifically excepted to the ruling that "This Hearing Officer is bound by the findings of the Board of Trustees' Report and Order as to all evidence considered in the course of the first application concerning Appellant's job and condition(s)."[35] Appellee's exceptions do not challenge this determination.[36]

Equally, Appellee's exceptions allege no error with the hearing officer's specific findings based upon administrative *res judicata.* Finding of Fact No. 9 addresses Appellee's cardiac condition. The hearing officer made the finding in relevant part denying disability: "based on the previous decision of the Board of Trustees and a review of the medical evidence submitted with the current application."[37] Appellee did not object to this

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[35] (A.R., p. 662).
[36] (A.R., pp. 682 – 685).
[37] (A.R., p. 677).

finding. Again, in Finding of Fact No. 11, the hearing officer applied *res judicata* in that "the fatigue that Claimant suffers as a result of her heart condition was considered by the Board of Trustees in the denial of Claimant's first application" and "based on the previous findings of the Board of Trustees and a review of the medical evidence submitted..." disability was denied. [38] Appellee alleged no error with this finding of fact other than the hearing officer should have considered the credibility of testimony (while simultaneously conceding that "the statute does not explicitly require any credibility findings.").[39] Not once does Appellee allege that Findings of Fact No. 9 or 11 were flawed by application of administrative *res judicata*. The reading audience would be left to guess.

Appellee relies upon a short statement tucked away in pleadings submitted several months prior to the hearing officer's recommended order as the basis of preservation. Appellee, in turn, used stock language in her exceptions "incorporating by reference" these statements from prior pleadings. Arguments advanced in pleadings prior to a hearing officer's recommended order do not provide a measure of relief from the requirement of preservation through specific exceptions. The Court of Appeals concluded the same in *Kroger Ltd. Partnership v. Cabinet for Health and Family Services*, 2007 WL 4553667 (Ky. App.).[40] In *Kroger*, twelve (12) generalized exceptions to the hearing officer's recommended order were raised:

> 1. The Findings of Fact on which the Recommended Decision is based are defective, in whole or in part, in that they are without the support of substantial evidence on the whole record.
>
> 2. The Conclusions of Law on which the Recommended Decision is based are defective in that they do not accurately reflect the applicable legal principles involved or are not based upon substantial evidence of record.

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[38] (A.R., pp. 678-679).
[39] (A.R., p. 684).
[40] Cited pursuant to CR 76.28(4)(c).

3. The record establishes that the action of the Cabinet for Health Services, Department of Public Health ("Cabinet") was in excess of its statutory authority and that the Cabinet failed to follow its own procedures and those provided under applicable Federal regulations, as a result of which Kroger was deprived of its right to equal protection of the laws.

4. The record establishes that Kroger was deprived of its right to due process, as guaranteed by the Federal and Kentucky Constitutions.

5. The record establishes that the Findings of Fact, Conclusions of Law and Recommended Decision defy reasonable business practice standards.

6. The Recommended Decision is in violation of federal and state constitutional, statutory and regulatory provisions.

7. The Recommended Decision is in excess of the Cabinet's authority.

8. The Recommended Decision is without support of substantial evidence on the whole record.

9. The Recommended Decision is arbitrary, capricious and represents an abuse of discretion.

10. The Recommended Decision is deficient and contrary to established federal and state law.

11. The Compliance Buys on which the Recommended Decision is based violated the Cabinet's own regulations.

12. The Federal and State regulations utilized by the Cabinet and relied upon in the Findings of Fact, Conclusions of Law and Recommended Decision exceed the authority and language of the enabling legislation and are void.

On appeal the Cabinet argued judicial review should be denied because the above exceptions filed by Kroger were vague. The Court of Appeals agreed holding that the generality of the exceptions were "tantamount to having filed no exception at all" hence concluding that the only issues properly preserved were those findings that differed from the agency head's final order and the hearing officer's recommended order citing *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

In so ruling, the Court of Appeals responded to Kroger's argument that its pleadings prior to the hearing officer's recommended order were detailed so as to add context to the generalized statements for preservation purposes. In *Kroger*, two months prior to issuance of the hearing officer's report, the appellant filed detailed proposed findings of fact, conclusions of law and a recommendation. Appellant argued that this prior pleading preserved for judicial review any complaints at variance with the subsequently issued findings of the hearing officer issued two months later. The *Kroger* Court flatly rejected this argument. To accept Appellee's rationale otherwise would dispense with the requirement for filing specific exceptions under KRS Chapter 13B.

The same is true here. If it were sufficient that a party simply use boilerplate language "incorporating by reference" prior briefs as sufficient to preserve findings, conclusions or recommendations believed to be at conflict with those prior briefs, the necessity for filing specific exceptions would be abandoned. This is not the law. A reviewing court is not required to look backwards to prior pleadings to ascertain the context and substance of otherwise generalized exception statements. The *Kroger* Court stated:

> We simply do not see how a pleading submitted to the ALJ on April 15, 2005, can preserve complaints that did not arise until the ALJ issued his decision a month later on June 15, 2005. If that were the case, filing exceptions to preserve an issue for our review would be required only when a party has not filed proposed findings of fact, conclusions of law and a recommended order. Our research has not revealed that to be the case.

Similar to *Kroger*, here Appellee's position statement and reply brief filed on November 29, 2010 and January 17, 2011, respectively, do not preserve alleged errors in a hearing officer's recommended order issued March 21, 2011. Appellee's vague exception statement that "the Claimant hereby incorporates by reference her Position Statement and

Reply Statement as if fully set forth herein" does not properly preserve the issue of *res judicata.*

Kentucky Retirement Systems posited this exact argument to the Court of Appeals citing *Kroger* and the well-recognized *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004). It would be an understatement to say that this argument was central to Kentucky Retirement Systems' brief on the merits. Nonetheless, the Court of Appeals' published opinion gave no consideration to this deciding issue and as a result improperly acted (and allowed the Franklin Circuit Court to act) outside the well-established boundaries of judicial review in KRS Chapter 13B appeals. This Court must reverse to safeguard against a burdening overexpansion of what was intended to be a narrowly tailored review.

III. The Franklin Circuit Court and Court of Appeals Erred in the Interpretation and Application of KRS 61.600(2) related to *Res Judicata.*[41]

Even assuming *arguendo* that Appellee properly preserved the issue of *res judicata*, the lower court(s) committed reversible error in its interpretation and application of Kentucky Retirement Systems' statutory scheme in KRS 61.600 with respect to multiple disability claims and *res judicata.*

Res judicata, translation: "a matter adjudged." *Black's Law Dictionary* 905 (6th ed. 1991). A common law doctrine that "a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim,

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[41] Pursuant to CR 76.12(4)(v) this issue was properly raised and preserved for judicial review. *See* Franklin Circuit Court Brief for Kentucky Retirement Systems, pp. 10-13, where Kentucky Retirement Systems asserts that the hearing officer and agency decision to apply *res judicata* represents a correct application of the law. *See also* Court of Appeals Brief for Appellant Kentucky Retirement Systems argument "The Franklin Circuit Court erred in its Interpretation and Application of KRS 61.600(2) and the Failure to Apply *Res Judicata.*" Pp. 12-17.

demand or cause of action." *Id.* It is predicated upon two distinct subparts: 1) claim preclusion and 2) issue preclusion. "Claim preclusion bars a party from relitigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action." *Yeoman v. Com., Health Policy Board,* 983 S.W.2d 459, 465 (Ky. 1998); *Beverage Warehouse, Inc. v. Com., Dept. of Alcoholic Beverage Control*, 382 S.W.3d 34 (Ky. App. 2011). "Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in the earlier action." *Id.* It imposes reasonable limitations on the proverbial "second bite at the apple" and provides a measure of finality. "However, to preclude the litigant from taking the 'extra bite,' courts have put certain restrictions on the 'apple.' For example, the 'apple,' or the issue or claim involved in the case, must be exactly the same as the previously litigated claim or issue. The issue or claim in the first case must also have been litigated to a final order." *Kentucky Administrative Law*, 2nd Ed. § 12.32 (UK/CLE)(2006).

Res judicata serves the essential function of preventing repeat litigation over the same claims with the same issues. Safeguarding against endless litigation, through the filing of duplicative applications and attempts to draw a different medical review board panel or hearing officer to revisit what has already been decided after full due process including an opportunity to be heard at a meaningful time and in a meaningful manner. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). *See also Ky. Comm'n on Human Rights v. Lesco Mfg & Design Co.,*736 S.W.2d 361 (Ky. App. 1987)(wherein the court found that for *res judicata* to bar future litigation, there must be a full and fair hearing including a judicial-type adversary proceeding, with testimony taken under oath, witnesses being available for cross-examination and a record of the proceeding).

Res Judicata is embodied within the plain language of KRS 61.600(2) requiring as a pre-requisite to successive applications the introduction of new objective medical evidence:

> A person's disability reapplication based on the same claim of incapacity shall be accepted and reconsidered for disability if accompanied by new objective evidence. The reapplication shall be on file in the retirement office no later than twenty-four (24) months after the person's last day of paid employment in a regular full-time position.[42]

Under the statutory scheme, if an application for disability is denied, he may reapply (submit a second application) if the application is timely and based on "new" evidence. The statute embodies the core element of *res judicata* that a different outcome is only warranted when new evidence is introduced sufficient to change the issue of whether a permanent incapacity exists under KRS 61.600. These conditional requirements prevent the perpetuation of previously rejected disability claims predicated upon identical facts on the off chance that a different reviewing body may reach another conclusion. *Res judicata* fosters finality and consistency. Its application safeguards against a multitude of mirror-image disability monetary claims having been previously adjudicated and denied.

This doctrine enjoys favorable acceptance in the administrative arena, and specifically KRS Chapter 13B disability adjudications at Kentucky Retirement Systems. For acceptance of *res judicata* in disability determinations, one need look no further than the three unanimous Court of Appeals' decisions: *Holland v. Kentucky Retirement Systems*, 2003 WL 1256710 (Ky. App.); *Hoskins v. Kentucky Retirement Systems*, 2011 WL 112147 (Ky. App.); and *Howard v. Kentucky Retirement Systems*, 2013 WL 5603579 (Ky. App.).

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[42] (Emphasis added).

In *Holland v. Kentucky Retirement Systems*, 2003 WL 1256710 (Ky. App.) the Court of Appeals confirmed that *res judicata* applies to a previous agency final order regarding a disability application that was not appealed, stating **"because Holland did not appeal from the board's order adopting the hearing officer's conclusion, this finding is *res judicata*."**[43] This is identical to the instant case.

The seminal decision affirming application of *res judicata* to repeat claims of disability is *Hoskins v. Kentucky Retirement Systems, et al.*, 2011 WL 112147(Ky. App.). Hoskins filed successive applications for disability retirement benefits. As with the case at hand, in *Hoskins* "the Board concluded that this claim was barred by *res judicata*." *Id.* The Court of Appeals' three judge panel unanimously agreed, stating in relevant part:

> The doctrine of *res judicata* prevents the relitigation of the same issues in a subsequent appeal and includes every matter belonging to the subject of the litigation which could have been, as well as those which were, introduced in support of the contention of the parties on the first appeal. *Id.* at 487-88. **The Board properly refused to consider evidence and arguments which were presented in the first application. We find no error in this decision.** [44]

More recently, the Court of Appeals in *Howard* again unanimously solidified *res judicata's* place in disability appeals with the affirmation that "**[i]t must also be noted that because this is Howard's second application for benefits, *res judicata* applies; therefore, we only review denial of benefits as it relates to the new evidence submitted with the second application.**"[45]

Here, however, the Franklin Circuit Court and Court of Appeals fail to expound on the outcome reached in direct contradiction to this firmly established body of law

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[43] (Emphasis added).
[44] (Emphasis added).
[45] (Emphasis added).

permitting *res judicata.* In *Hoskins*, virtually identical to the instant case, the applicant filed successive (first and second) applications for disability retirement benefits. The first application was denied. Included with the second application was "a vast amount of evidence concerning [the applicant's] mental health condition." *Id.* However, the evidence indicated that Hoskins' condition remained unchanged since her last application for benefits. *Id.* As with the case at hand, in *Hoskins* "the Board concluded that this claim was barred by *res judicata*." *Id.* The *Hoskins* Court did not mince words when holding that the agency's refusal to consider prior evidence and arguments under the auspices of *res judicata* was proper, *to wit:*

> Hoskins claims that the hearing officer erred by requiring her to demonstrate a change in condition between her first application for benefits and her second application for benefits. KRS 61.600 allows applicants to refile for disability benefits. In order to do so, however, **the applicant must only show that new evidence was presented which would justify the award of benefits. KRS 61.600(2)**.
>
> **Although a change in condition is not required, the applicant cannot relitigate the same facts and issues under the doctrine of *res judicata* *E.F. Prichard Co. v. Heidelberg Brewing Co.*, 234 S.W.2d 486 (Ky. 1950).** 'The doctrine of *res judicata* prevents the relitigation of the same issues in a subsequent appeal and includes every matter belonging to the subject of the litigation which could have been, as well as those which were, introduced in support of the contention of the parties on the first appeal. *Id.* at 487-88. **The Board properly refused to consider evidence and arguments which were presented in the first application. We find no error in this decision**.[46]

And while *Hoskins* noted that a change in condition is not required, the court made clear that an applicant cannot relitigate the same facts and issues. *See also Bauer v. Alcoholic Beverage Control*, 320 S.W.2d 126 (Ky. App. 1959) (*res judicata* applied to an

[46] (Emphasis added).

administrative agency's denial of a liquor license finding no real change in circumstances from the first application to the second application.).

Yet here, the Franklin Circuit Court opinion provided a minimal examination of *Hoskins*, stating only that the case logic relied upon in *Hoskins* - - *E.F. Prichard co. v. Heidelberg Brewing Co.*, 234 S.W.2d 486 (Ky. 1950) - - was factually distinct because it did not "concern KRS 61.600(2), nor any similar statute that provides for benefits based on medical evidence," and thus it was "ultimately irrelevant."[47] The Franklin Circuit Court reasoned "[a] person's medical condition, however, can and often does change and worsen over time. Further, medical evidence may not be initially available, but often becomes available over time" and thus evidence and claims ruled upon in the first application should be reconsidered.[48] Only by way of footnote did the Franklin Circuit Court conclude that "[b]y their refusal to review the original medical evidence submitted by Ms. Carson with her first application, the KRS acted contrary to the statutory language of KRS 61.600(2)."[49]

In so doing, the Franklin Circuit Court misconstrued the literal language of the statute, making the quantum leap that reconsidering a claim "accompanied" by new objective medical evidence mandates reconsideration of the hearing officer's prior findings and conclusions issued with respect to evidence submitted alongside a prior application. The lower court then self-reasons to conclude otherwise would make the second disability application process "virtually futile" but doesn't explain why permitting a member to

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[47] *See* Opinion and Order, p. 7. The lower court was also dismissive of *Stewart v. Sizemore*, 332 S.W.2d 281 (Ky. App. 1960) and *Ky. Comm'n on Human Rights v. Lesco Mfg & Design Co.*, 736 S.W.2d 361 (Ky. App. 1987) because these cases did not involve a statute "that provides benefits based on medical evidence." *See* Opinion and Order, p. 7

[48] *See* Opinion and Order, p. 7.

[49] *See* Opinion and Order, p. 6, n.1.

submit another application for disability with new medical evidence is an act in futility other than to surmise that any such review would not be "comprehensive" in its words. [50]

The Court of Appeals' opinion affirming was equally unconvincing in its attempt to reconcile the outcome with the existing interpretation of KRS 61.600(2) and supporting body of case law, simply stating:

> We acknowledge KERS' citation to two recent unpublished cases, *Howard v. Kentucky Ret. Sys.*, 2012[51] WL 5603579 (Ky. App., Oct 11, 2013)(2012-CA-001488-MR) and *Hoskins v. Kentucky Ret. Sys.*, 2011 WL 112147 (Ky. App., Jan. 14, 2011)(2009-CA-000905-MR). Based on our reading of KRS 61.600(2) and our review of the record in this case, those cases do not compel a different result.[52]

The above passage is the sum total of the Court of Appeals' explanation for its decision to deviate from multiple prior opinions by the same court (differing panels[53]) unequivocally applying administrative *res judicata*. The Court of Appeals' opinion creates a discernible departure from existing law, changing the landscape of disability reviews but providing insufficient legal reasoning for its decision to do so.

The Court of Appeals' does concede that the Appellee was provided the threshold requirements necessary to trigger *res judicata* ("disability claims are litigated under full and fair hearings, in a judicial type adversary proceeding, testimony taken under oath, witnesses cross-examined, and a record made.") citing *Kentucky Comm'n on Human Rights*

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[50] Franklin Circuit Court Opinion and Order, p. 6.
[51] The Court of Appeals' Opinion incorrectly cites the case as "2012 WL 5603579" and the correct Westlaw citation should be "2013 WL 5603579."
[52] Opinion Affirming, p. 14
[53] The Court of Appeals unanimous three judge panel in *Holland v. Kentucky Retirement Systems,* 2003 WL 1256710 (Ky. App.) included Johnson, Knopf, and Miller.
The Court of Appeals unanimous three judge panel in *Howard v. Kentucky Retirement Systems,* 2013 WL 5603579 (Ky. App.) included Caperton, Dixon and Stumbo.
The Court of Appeals unanimous three judge panel in *Hoskins v. Kentucky Retirement Systems*, 2011 WL 112147 (Ky. App.) included Moore, Thompson and White.
The Court of Appeals unanimous three judge panel in the instant case included Kramer, Taylor and Vanmeter.

v. Lesco Mfg & Design Co., 736 S.W.2d 361 (Ky. App. 1987).[54] Notwithstanding, the Court of Appeals still refused to apply *res judicata*, concluding that "the legislature, by the language in the statute, has modified the traditional concept of *res judicata* which would otherwise prohibit the refiling of a claim based on the same incapacity" and thus "we find no merit in KERS' argument that Carson was somehow prevented from filing this second application."[55]

The above rationalization illustrates the Court of Appeals' patent misunderstanding of the case and arguments presented. Kentucky Retirement Systems has never argued that Appellee was barred from filing a second application for disability benefits. KRS 61.600(2) unequivocally provides for a second disability application. However, consistent with the plain language of the statute and Court of Appeals' prior recurring interpretation, Appellee's second application would be limited in review to newly introduced objective medical evidence and findings relative to evidence previously submitted, evaluated, and litigated through the evidentiary hearing process would be subject to *res judicata*. *See Holland; Hoskins, Howard,* supra.

This was precisely why, in the instant case, the second hearing officer with the second application after the second evidentiary hearing applied *res judicata* to the findings and conclusions of the prior hearing officer with respect to previously introduced evidence at the first evidentiary hearing. The letter of the law articulated by the *Hoskins* Court was followed. The hearing officer certainly compared and contrasted the agency findings and

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[54] It is interesting to note that the Court of Appeals' Opinion pages 12-13 relies extensively on the analytical framework in *Kentucky Comm;n on Human Rights v. Lesco Mfg. & Design Co.*, 736 S.W. 361 (Ky. App. 1987) and admits that KERS disability hearings satisfy the requirements set forth in *Lesco*. However, when the Franklin Circuit Court was presented with this same case, it concluded that *Lesco* was "irrelevant to the case at hand." *See* Franklin Circuit Court Opinion, p. 7.

[55] Opinion Affirming, pp13-14.

conclusions regarding the objective medical evidence accompanying the first application as well as evaluating the newly submitted evidence accompanying the second request for disability. The hearing officer pointedly responded to Appellee's theory of the case with her second application that her health had declined and alleged disabling condition worsened from one application to the next. For example, the hearing officer issued the specific finding that "In fact, it appears that Claimant's ejection fraction has improved since her first application was reviewed."[56] As such, it was error for the lower courts to conclude that the agency wrongly refused to evaluate the "totality" of the objective medical evidence by operation of *res judicata*. It is clear that the administrative decision represents a correct application of the law under the literal language of the statute, common law doctrine, and progeny of supporting case law. The decision of the Franklin Circuit Court and Court of Appeals should be reversed and the agency final order reinstated by this Honorable Court.

IV. The Agency Decision Represented a Correct Application of the Law Supported by Substantial Evidence.[57]

Irrespective of *res judicata*, the agency final order denying disability benefits was supported by substantial evidence from the record as a whole. Remand was not warranted. Appellee testified that between the times of the first application and second, her diagnosis as it relates to the heart condition has remained unchanged.[58] Appellee also testified that since the date of the evidentiary hearing on her first application, her cardiac ejection fraction has not further declined, but remained unchanged. [59] The objective medical

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[56] (A.R., p. 677)(Emphasis added).
[57] Pursuant to CR 76.12(4)(v) this issue was properly raised and preserved for judicial review. *See* Franklin Circuit Court Brief for Kentucky Retirement Systems, pp. 13-19, where Kentucky Retirement Systems asserts that agency decision to deny disability benefits was supported by substantial evidence. *See also* Court of Appeals Brief for Appellant Kentucky Retirement Systems argument "The Agency Decision was Supported by Substantial Evidence." Pp. 17-21.
[58] (Tape, 10/19/10, 10:03:00 – 10:0315).
[59] (Tape, 10/19/10, 10:03:38 - 10:04:10).

evidence submitted, however, actually demonstrated an improved cardiac function. The hearing officer recognized the same.

Appellee's ICD (implantable cardioverter defibrillator) was successfully optimized. In May of 2009, Dr. Mann charted that Appellee "has had no problems with her defibrillator."[60] Her ejection fraction, which was originally between 15-25%, nearly doubled to 35-40%.[61] In November 2009, Appellee treated with Cardiovascular Associates, PSC, where it charts in relevant part, "Generally she is feeling better. She was evaluated by Dr. McCants and their echocardiogram showed an ejection fraction of 35%, which is improved from what it was before."[62] Dr. Mann assessed that "I feel that Ms. Carson is actually doing very well."[63] Although Appellee did experience a "brief episodes of atrial tachycardia," Dr. Mann continued to feel that she did not need Coumadin and made no changes in Appellee's care.[64]

Appellee's primary complaints were that chronic pain and fatigue prevented her from performing her sedentary job duties. Appellee was accommodated in this respect and her regular 8 hour work day was cut by her employer by half to 4 hours a day. A letter from Dr. David Mann dated April 21, 2009 describes in relevant part that "regarding her activity level, Ms. Carson can sit indefinitely. She can stand for 10-15 minutes. She cannot walk further than half a city block. Lifting is limited to 5 pounds."[65] These restrictions were well within Appellee's sedentary job duties.

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[60] (A.R., p. 282).
[61] (A.R., p. 266).
[62] (A.R., p. 279)(Emphasis added).
[63] (A.R., p. 281)(Emphasis added).
[64] *Id.*
[65] (A.R., p. 285).

The new objective medical evidence submitted proved that Appellee's alleged disabling chronic pain actually became well controlled and resolved. A medical note dated May 20, 2009 from Pain Control Network, PSC charts: "my impression is that the patient's pain pattern is well controlled."[66] On that date, Appellee reported a pain intensity scale of "0/10".[67] Appellee also treated with psychologist James Thompson on May 20, 2009, where he charts a pain rating of zero. He further notes that "in terms of general health, the patient reported that since our last session she has learned that her heart condition was not as serious as previously thought" and that "physical functioning has improved over the last few weeks."[68] On June 10, 2009, Appellee reported to Dr. Thompson a "pain rating of 0 on a scale of 10" and that "physical and social functioning have improved."[69] On July 1, 2009, Appellee treated with Dr. Dunbar of Pain Control Networks, PSC where he charts that she was "doing exceptionally well."[70] He goes on to chart that:

> The patient states that for the first time in years, she was able to exercise this morning. Her hydrocodone is prescribed for 1 per day. Today she is requesting I increase it to twice per day. Conversely, I stated to her that because her pain scores are so low, I would like to discontinue it altogether.[71]

On that day, Appellee reported a pain scale rating of 0/10 and that the worst pain she had experienced on a scale of 1-10 was a 2.[72] In August of 2009, Dr. Dunbar of the Pain Control Network characterized Appellee's health as "very stable" and that "the patient has enjoyed a stable pain pattern."[73] Appellee reported a pain scale intensity as 1 on a scale of 0 to 10

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[66] (A.R., p. 267)(Emphasis added).
[67] (A.R., p. 266).
[68] (A.R., p. 492)(Emphasis added).
[69] (A.R., p. 491)(Emphasis added).
[70] (A.R., p 263)(Emphasis added).
[71] *Id.*
[72] *Id.*
[73] (A.R., p. 261)(Emphasis added).

with 10 being the most severe. Dr. Dunbar charted that Appellee was doing extremely well and "her fibromyalgia pain is abating."[74] On October 7, 2009 (approximately two weeks prior to filing the second application for disability retirement benefits) Appellee treated with the Pain Control Network for diffuse intermittent Fibromyalgia where it charted a current pain intensity of "0/10."[75] The Appellee did not prove she experienced permanently incapacitating pain preventing her from working as a disability adjudicator. Nor did the new objective medical evidence support a finding of disabling chronic fatigue but that Appellee experienced increased energy, activity and decreased fatigue. For instance, a September 10, 2009 progress note charts in relevant part that "patient reported that she is more physically and socially active than in the past, and is now exercising two to three times per week. She is also planning social events in the future, such as a high school class reunion."[76] On October 7, 2009, Appellee reported a dramatic decrease in symptoms of fatigue and she was released Dr. Thompson's care because her psychological stability is exemplary and she recently returned from a road trip to Wisconsin, where she had excellent energy and no days of bed rest.[77] Appellee had "excellent energy" with no daytime bed rest and a pain rating of 0 / 10:

DATE OF SERVICE:	10-07-09
PREOPERATIVE DIAGNOSIS:	1) Fibromyalgia 2) Chronic pain syndrome
POSTOPERATIVE DIAGNOSIS:	Same
PROCEDURES PERFORMED: 1) Pain re-evaluation/office visit.	
HISTORY:	The patient is a pleasant 58-year-old white female with diffuse body pain consistent with fibromyalgia, who is being treated with Cymbalta and Gabapentin with very good results. Her last evaluation was on 08-12-09, at which time her ADLs had improved and there were no side effects related to her medications. She continues to have more good days than bad days. She has been released from Dr. Thompson's care as he feels that her psychological stability is exemplary. The patient returns from a road trip to Wisconsin, where she states she had excellent energy and no days of bed rest. The patient has not received a flu shot. There is speculation that she may have had the flu. Stool cultures are also pending.
LOCATION OF PAIN:	Her pain is bilateral. She illustrates her pain as virtually being from the top of her head to the soles of her feet and in both upper extremities.
QUALITY OF PAIN:	Her pain is described as intermittent.
PAIN INTENSITY SCALE: Today: 0/10 Worst: 4/10 Best: 0/10	

[74] (A.R., p. 260)(Emphasis added).
[75] (A.R., p. 387).
[76] (A.R., p. 495)(Emphasis added).
[77] (A.R., p. 259).

Appellee's treatment provider(s) charted that her associated pain was abating and most interesting that her fibromyalgia test was "negative":

PHYSICAL EXAMINATION:	
Mental Status:	Alert and oriented to person, place and time.
Height:	5'5"
Weight:	144 lbs.
Blood Pressure:	110/65
Heart Rate:	95 and regular
Respiration:	16
Temperature:	97.1 Degrees
O2 saturation:	99% on room air
Upper Extremities:	Motor strength and tone is 5/5 and equal bilaterally. Sensory examination is symmetrical and equal bilaterally. In terms of tender points, the patient does not have any tender points in her upper extremities or lower extremities.
Cervical Spine:	She has minor tender points in the left posterior cervical trapezius region, which is a dramatic improvement.
Fibromyalgia Test:	Interestingly, this is actually negative today. The patient is tender in 4/18 muscle groups tested.

IMPRESSION/DECISION-MAKING: Overall, I feel that this patient is progressing extremely well. She is compliant with her utilization of Cymbalta. Her fibromyalgia pain is abating.

Behavioral Health Intervention Progress Note

Patient Name:	Dianne Carson
Referring Physician:	Elmer Dunbar, M.D.
Date of Service:	June 10, 2009
Medical Diagnosis:	(780.96) Generalized pain
Type of Service:	Individual behavioral health intervention (Time: 1 hour)
Purpose of Service:	Reduce the effects of psychological and behavioral factors on the patient's pain perception and sensitivity, improve her cognitive and behavioral pain-coping skills, improve sleep quality, improve the patient's response to medical pain treatment.
Biopsychosocial Status:	This patient presented for today's session with a pain rating of 0 on a scale of 10, although Mrs. Carson acknowledges that had recently taken pain medication. She reports no changes in general health or medications. Mental status was unchanged. Physical and social functioning have improved. Psychologically, the patient displayed no significant depression or anxiety, but does continue to struggle with tension, worry, and sleep difficulties. Current stressors include pain, health concerns, finances, and changes to her family role and relationships.

[78] The new submitted objective medical evidence illustrated that Appellee was essentially pain free, with a stabilized cardiac function, increased physical function, increased energy, and decreased fatigue. The hearing officer was correct in denying disability under KRS 61.600. The case did not require a remand for further fact-finding as ordered by the lower court(s).

[78] (A.R., p. 259-260, Exhibit 51).

In an effort to bolster her second claim for disability benefits, Appellee submitted Exhibit 50 - - "Assessment of Dr. Mann, Cardiologist" and "Assessment of Dr. Berg, Pain Management" - - completed in May of 2010, greater than two years after her last day of paid employment. Appellee admitted during the administrative hearing that the "Cardiac Residual Functional Capacity Questionnaire" and "Chronic Fatigue Syndrome Residual Functional Capacity Questionnaire" were drafted by Appellee's attorney for her to provide to her doctors to complete.[79] These self-serving questionnaires were not corroborated by the actual objective medical evidence. Dr. Berg even admitted on the questionnaire that "I do not perform formal functional capacity evaluations."[80]

It is well established that the court may not substitute its own judgment as to the inferences to be drawn from the evidence of record for that of the administrative agency. *Railroad Comm. v. Chesapeake & Ohio*, 490 S.W.2d 763 (Ky. 1973). The trier of facts in an administrative agency "is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it." *Bowling v. Natural Resources and Envtl. Protection Cabinet*, 891 S.W.2d 406, 409-410 (Ky. App. 1994). "To put it simply the trier of facts in an administrative agency may consider all the evidence and choose the evidence that he believes." *Id.*, at 410. As long as there is substantial evidence in the record supporting the agency's finding, the Court must defer to that finding, even if there is evidence to the contrary. *Kentucky Comm. on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981). Here, there was substantial evidence to support the decision to deny disability benefits. The evidence did not compel a different result.

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[79] (Tape, 10/19/2010, 10:06:10 – 10:07:03).
[80] (A.R., Exhibit 50).

CONCLUSION

The agency properly applied *res judicata* and the decision to deny disability represented a correct application of the law supported by substantial evidence from the record. The Court of Appeals and Franklin Circuit Court erred in reversing and remanding the case for further proceedings.

WHEREFORE, Kentucky Retirement Systems respectfully requests that this Court REVERSE the opinion and order of the Court of Appeals and Franklin Circuit Court and REINSTATE the agency final order.

Respectfully submitted,

KENTUCKY RETIREMENT SYSTEMS

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